84-1280

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No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1984

CHARLOTTE BOLDEN, *Petitioner*

v.

TARRANT COUNTY DEPARTMENT
OF HUMAN RESOURCES, *Respondent*

Petition for a Writ of Certiorari to the Supreme Court of Texas

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QUESTION PRESENTED

Whether the United States Constitution requires a state appellate court to review independently the entire record in a parent-child termination case to insure that the judgment terminating the parent-child relationship was not rendered on less than clear and convincing evidence.

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No. _____

IN THE

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OCTOBER TERM, 1984

CHARLOTTE BOLDEN, *Petitioner*

v.

TARRANT COUNTY DEPARTMENT
OF HUMAN RESOURCES, *Respondent*

Petition for a Writ of Certiorari to the Supreme Court of Texas

Petitioner Charlotte Bolden prays that a Writ of Certiorari issue to review the order of the Supreme Court of Texas entered on September 5, 1984 in the case entitled In the Interest of R.B., a Child. That order was a refusal of petitioner's application for writ of error, and was made with the notation "no reversible error."

OPINIONS BELOW

The Supreme Court of Texas refused petitioner's application for writ of error without issuing an opinion. The order refusing the writ of error appears in Appendix "A" to this petition. Petitioner's motion for rehearing in the Supreme Court of Texas was denied on October 10, 1984, without opinion. The order of the Supreme Court entered October 10, 1984 appears as Appendix "B" to this petition. The Court of Appeals for the Second Supreme Judicial District of Texas, on March 22, 1984, affirmed the trial court's judgment that the parent-child relationship between petitioner and her daughter be terminated. The opinion of the Court of Appeals, which was not published,

appears in Appendix "C" to this petition. The judgment of the trial court appears in Appendix "D" to this petition.

JURISDICTION

The Supreme Court of Texas refused petitioner's application for writ of error on September 5, 1984. A timely motion for rehearing was denied on October 10, 1984. Justice White ordered on December 17, 1984 that the time to petition for a writ of certiorari be extended to and including February 7, 1985. The jurisdiction of this Court is invoked under the provisions of 28 U.S.C. §1257(3).

CONSTITUTIONAL PROVISION INVOLVED

The fourteenth amendment to the United States Constitution provides in relevant part:

> No state shall . . . deprive any person of life, liberty, or property, without due process of law . . . .

STATEMENT OF THE CASE

Petitioner Charlotte Bolden is the mother of three children — Marie Bolden, Robin Bolden, and Emmanuel Bolden. (Emmanuel was born after the trial of this cause and is not mentioned in the record.) Robin, the second child, was born prematurely on January 8, 1982; she weighed two pounds, five ounces at birth. She was retained in the intensive care unit of the hospital from her birth until she was sixty-six days old, and was discharged to the care of petitioner on March 15, 1982. The child weighed five pounds, one ounce at the time of discharge from the hospital. She was in the care and control of petitioner from March 15, 1982 until June 21, 1982 — a period of ninety-eight days. On June 21, 1982, the child was admitted to the hospital with a weight of six pounds, eight ounces and was diagnosed as having a growth failure. The child remained in the hospital for eleven days, and was discharged to the care of a foster parent on July 2, 1982. She remained in foster care thereafter.

On July 1, 1982, the day before the child's release from the hospital, the Tarrant County Department of Human Resources (hereinafter referred to as the state) filed a petition seeking the termination of the parent-child relationship between Robin Bolden and her mother. An attorney ad litem was appointed to represent the child, and trial was to a jury on June 20th and 21st, 1983.

The evidence at trial showed that if the child had not been hospitalized on June 21, 1982, she probably would have suffered physical harm as a result. There was also evidence that petitioner, before the hospitalization of Robin, had rescheduled one appointment for the child and had missed another appointment for the child at the pediatric clinic. In general, the caseworker did not consider petitioner cooperative. The state's witnesses proved that at the time of trial the child had no particular medical problems, was of satisfactory weight, and was at age level in her motor development. Petitioner's older child, who had no special medical problems in her infancy, is healthy and has never been underweight. Petitioner visited regularly and frequently with Robin from the time the child was placed in foster care to the time of trial. Robin and her mother had an appropriate and affectionate relationship.

Although the record shows that Robin Bolden needed the intervention of state social workers in June 1982, the record is devoid of any evidence that Robin Bolden had any special needs at the time of trial, or that petitioner was unable to care for Robin Bolden at the time of trial. At most, the evidence proved that the child's special needs as a premature baby and the mother's nonfeasance during the period of that special need combined to require intervention into the family. In fact, the evidence tended to show that the child had no particular medical problems at the time of trial, and that petitioner was capable of caring for a child with no particular medical problems. In final argument the attorney ad litem for the child recommended against termination.

The case was submitted to the jury on three special issues: (1) did the mother knowingly place or allow the child to

remain in conditions or surroundings which endangered her physical or emotional well-being; (2) was termination of the parent-child relationship between the mother and the child in the child's best interest; and, (3) would it be in the child's best interest for the state to be appointed her managing conservator. The jury answered yes to each of the issues, and judgment was rendered terminating the parent-child relationship between Robin and her mother.

Petitioner challenged the sufficiency of the evidence to support the judgment in a motion for judgment non obstante veredicto, which was overruled by the trial court prior to rendition of judgment. In her appeal to the Court of Appeals she challenged both the factual and legal sufficiency of the evidence to support the judgment. On page four of her brief in that court she argued

> . . . [T]he natural right between parent and child is a fundamental constitutional right, and for that reason all the proceedings below will be strictly scrutinized by the Court of Appeals, and every fact which must be proved on either question — that is, whether appellant knowingly placed or allowed the child to remain in conditions or surroundings which endangered the child's physical or emotional well-being, and whether termination of the parent-child relationship was in the child's best interest — should be reviewed and compared to the standard of clear and convincing proof rather than proof by a preponderance of the evidence.

The Court of Appeals committed plain error by failing to exercise an independent review of the record below. The Court of Appeals stated that its review was limited to determining

> . . . [W]hether the verdict was so against the great weight and preponderance of the evidence as to be manifestly unjust. *In re King's Estate*, 244 S.W.2d 660,661(Tex. 1951). In other words, this court must decide if the evidence which supports the jury's answers to the special issues is so weak, or the evidence to the

> contrary is so overwhelming as to warrant a setting aside of the verdict and remanding for a new trial. (citations omitted) (App. p. A-4).

The citations the Court of Appeals relied upon involved challenges to the sufficiency of the evidence in cases which required only proof by a preponderance of the evidence. There was no recognition that an appellate court has a constitutional duty to utilize a higher standard of review when deciding a termination case.

Petitioner directly challenged this failure by alleging in her motion for rehearing in that court that "The Court of Appeals failed to apply a standard of review commensurate with the requirement that proof be by clear and convincing evidence, and applied instead a standard of review commensurate with proof by a preponderance of the evidence." The motion for rehearing was overruled without opinion.

Petitioner raised the same point, in the same language, in her application for writ of error in the Supreme Court of Texas. The application was denied without opinion. Petitioner filed her motion for rehearing in the Supreme Court of Texas, claiming that "The Supreme Court [of Texas] should have exercised an independent review of the evidence in this case to determine whether or not it satisfied the clear and convincing evidence requirement, or, in the alternative, the Supreme Court [of Texas] should have directed the Court of Appeals to exercise such an independent review of the evidence in this case." The motion for rehearing was overruled without opinion.

REASONS FOR GRANTING THE WRIT

This case involves an important question of federal law which has not been, but should be, settled by this court. The question is whether the due process clause of the United States Constitution requires a state appellate court to review independently the entire record in a parent-child termination case to insure that the judgment terminating the parent-child

relationship was not rendered on less than clear and convincing evidence.

This Court has declared that a state cannot terminate a parent-child relationship unless it proves its allegations by at least clear and convincing evidence. *Santosky v. Kramer*, 445 U.S. 745(1982). This standard of proof is a minimum requirement of due process, and is a matter of federal constitutional law. 445 U.S. at 755. Because minimum requirements of due process are a matter of federal law, they are not diminished by the fact that a state may have specified its own procedures for dealing with the same matter. *Id.* (citing *Vitek v. Jones*, 445 U.S. 480,491(1980)).

The court below expressed and utilized the wrong standard of review. It stated that, in reviewing challenges to the sufficiency of the evidence, its role is to "determine whether the verdict was so against the great weight and preponderance of the evidence as to be manifestly unjust . . . [or] decide if the evidence which supports the jury's answers to the special issues is so weak, or the evidence to the contrary is so overwhelming as to warrant a setting aside of the verdict and in remanding for a new trial." (App. p. A-4). Due process of law, and the meaningful implementation of *Santosky v. Kramer*, *supra*, require that the state appellate court make an independent review of the record of a termination proceeding and satisfy itself that a rational finder of fact could have found that the state proved its allegations by at least clear and convincing evidence.

In the first amendment area this Court has held that a public figure can only recover damages in a libel action if he proves the defamation was published with actual malice. *New York Times v. Sullivan*, 376 U.S.254(1964). The existence of actual malice must be proved by clear and convincing evidence. *Bose Corp. v. Consumers Union*, -U.S.-,104 S.Ct.1949,1965(1984). The holding in *Bose Corp. v. Consumers Union*, *supra*, is that in cases governed by *New York Times v. Sullivan*, *supra*, "Appellate judges . . . must exercise independent judgment and determine whether the record establishes actual malice with convincing clarity."-U.S.-,104 S.Ct. at

1967. The Court specifically rejected the contention that a jury finding implicating first amendment concerns is insulated from review merely by proper jury instructions and the existence of some evidence to support the jury findings. Rather, substantive constitutional limitations govern the review. -U.S.-,104 S.Ct. at 1963. The Court stated "The rule of independent review assigns to judges a constitutional responsibility that cannot be delegated to the trier of fact, whether the fact finding function be performed in the particular case by a jury or by a trial judge." -U.S.-,104 S.Ct. at 1959. Thus, in first amendment areas, the Supreme Court has both instituted a clear and convincing proof requirement with respect to actual malice, and has created a corresponding appellate standard of independent review of the entire record to insure that the clear and convincing standard was met at trial. A similar rule is needed for the review of termination cases.

In other areas this Court has also recognized the importance of an adequate standard of review in assuring that a required standard of proof is met. The Court held that the fourteenth amendment right to due process of law protects persons from criminal conviction except upon proof of guilt beyond a reasonable doubt. *In re Winship*, 397 U.S. 358(1970). This Court recognized, in *Jackson v. Virginia*, 443 U.S. 307(1979), that an adjustment in the standard for reviewing the sufficiency of the evidence to support a criminal judgment would have to be made in order to give meaningful implementation to *In re Winship, supra*. Before the opinion in *Jackson v. Virginia, supra*, a federal habeas corpus court only considered whether there was any evidence to support a state court conviction, and would only reverse the conviction if there were no evidence to support the finding of guilt. *Thompson v. Louisville*, 362 U.S. 199(1960). In *Jackson v. Virginia, supra*, the Court rejected the no evidence criterion, recognizing that the due process rights acknowledged in *In re Winship, supra*, required that the standard of review should be whether "upon the record evidence adduced at the trial no rational trier of fact could have found proof of guilt beyond a reasonable doubt." 443 U.S. at 324. The Court stated that the

application of the reasonable doubt standard at the trial court level was not sufficient of itself to insure that *In re Winship, supra,* was being followed. This assurance cannot be had simply by determining whether the jury was properly instructed and whether there was a "mere modicum of evidence" to support the verdict. 443 U.S. at 318-321.

The Court has also restricted the application of a state's harmless error rule, which is a matter of state appellate practice, in cases where the error alleged to be harmless was a violation of a federal constitutional right. *Chapman v. California,* 386 U.S. 18(1967). The Court in *Chapman v. California* said that when federal constitutional rights are involved it is appropriate for the federal courts to fashion the rule. 386 U.S. at 21. The Court held a state harmless error rule would not operate to prevent the reversal of a state court conviction because of a violation of the defendant's federal constitutional rights unless the reviewing court found the error to be harmless beyond a reasonable doubt. 386 U.S. at 23,24. The court in *Chapman v. California, supra,* fashioned a federal rule that restricted the application of state appellate review when the review involved matters of federal constitutional law. A similar ruling with respect to the scope of review in termination cases is needed and should be applied by this Court in this case.

The standard of review used by the Texas Court of Appeals in this case is the standard used in ordinary civil cases. A termination based improperly on a mere preponderance of the evidence will withstand such an appellate review. Such a review denies both the parent and the child in a termination case the required protection of their constitutional right to maintain the ties of a natural family unit. A jury finding of termination should not be insulated from review merely because the jury was properly instructed and there is some evidence to support its findings. Substantive constitutional limitations must govern the scope of review. Providing triers of fact with a general description of the burden of proof is not, in and of itself, sufficient to eliminate the danger that termination, a most drastic remedy, will be applied in inappropriate cases.

This Court has consistently held that the right to family integrity and privacy is a fundamental right. *Meyer v. Nebraska*, 262 U.S.390(1923); *Pierce v. Society of Sisters, 268 U.S.510(1925); Wisconsin v. Yoder*, 406 U.S.205(1972); *Stanley v. Illinois*, 405 U.S. 645(1972). The many reasons for protecting this right by the imposition of a clear and convincing standard of proof at trial are set out fully in *Santosky v. Kramer, supra*. The clear and convincing evidence standard will only protect these rights if, as a matter of federal constitutional law, state appellate courts are given the duty to review the evidence in termination cases under an expanded scope of review. It is necessary and proper for this Court to protect the fundamental constitutional rights involved by holding that, as a matter of federal constitutional law, state appellate courts must exercise an independent review of the record in termination cases to assure themselves that no termination judgment will stand if, upon the record evidence adduced at the trial, no rational trier of fact could have found the necessary proof by clear and convincing evidence. Because the Texas Court of Appeals committed plain error by utilizing a standard of review developed for ordinary civil cases where no heightened standard of proof is constitutionally required, this Court should vacate the order of the Supreme Court of Texas and remand with instructions to review the record in this case under the appropriate scope of review.

CONCLUSION

For the reasons stated above, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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Appendix A
Order of the Supreme Court of Texas
Refusing Writ of Error — September 5, 1984

SUPREME COURT OF TEXAS
P.O. Box 12248
Supreme Court Building
Austin, Texas 78711
Garson R. Jackson, Clerk

September 5, 1984

Mr. Richard Lee Griffin
West Legal Services
600 E. Weatherford
Fort Worth, TX 76102

Mr. Chris Mitchell
Chief, Appellate Section
Tarrant County District Attorney's Off.
200 West Belknap
Fort Worth, TX 76196

RE: Case No. C-3086

STYLE: IN THE INTEREST OF R.B.

Dear Counsel:

Today, the Supreme Court of Texas refused the above referenced application for writ of error with the notation, No Reversible Error.

Respectfully yours,

Garson R. Jackson, Clerk
By /s/ Blanca E. Morin
Deputy

Appendix B
Order of the Supreme Court of Texas
Denying Motion for Rehearing — October 10, 1984

SUPREME COURT OF TEXAS
P.O. Box 12248
Supreme Court Building
Austin, Texas 78711
Garson R. Jackson, Clerk

October 10, 1984

Mr. Richard Lee Griffin
West Legal Services
600 E. Weatherford
Fort Worth, TX 76102

Mr. Chris Mitchell
Chief, Appellate Section
Tarrant County District Attorney's Off.
200 West Belknap
Fort Worth, TX 76196

RE: Case No. C-3086

STYLE: IN THE INTEREST OF R.B.

Dear Counsel:

Today, the Supreme Court of Texas overruled petitioner's motion for rehearing of the application for writ of error in the above styled case.

Respectfully yours,

Garson R. Jackson, Clerk
By /s/ Courtland Crocker
Deputy

Appendix C
Opinion of the Court of Appeals for The Second Supreme Judicial District of Texas — March 22, 1984

NO. 2-83-174-CV
IN THE COURT OF APPEALS FOR THE
SECOND SUPREME JUDICIAL DISTRICT OF TEXAS

IN THE INTEREST OF R.B., Child

FROM THE 323RD DISTRICT COURT
OF TARRANT COUNTY

OPINION

The Tarrant County Child Welfare Unit of the Texas Department of Human Resources, appellee, brought suit to terminate the parental rights of appellant, Charlotte Bolden, the natural mother of R. B., and Robert Burns, the alleged natural father of the child. Appellee also sought to be appointed managing conservator of the child. The alleged natural father filed a waiver of interest in the child.

Trial was before a jury which answered three special issues and found that: (1) appellant had knowingly placed or allowed the child to remain in conditions or surroundings which endangered the physical or emotional well-being of the child; (2) termination of the parent-child relationship between appellant and her child would be in the best interest of the child; and (3) the appointment of the Texas Department of Human Resources as managing conservator would be in the best interest of the child.

The trial court overruled appellant's motion for judgment non obstante veredicto and rendered judgment terminating the parental rights of appellant and the alleged natural father, appointing the Tarrant County Child Welfare Unit of the Texas Department of Human Resources as managing conservator of the child, and authorizing the managing conservator

to place the child in adoption. From this judgment appellant perfected this appeal.

Judgment affirmed.

In her brief, appellant advances five points of error. In points of error one and two appellant contends there was no evidence and insufficient evidence to support the finding that she knowingly placed or allowed the child to remain in conditions or surroundings which endangered the physical or emotional well-being of the child. In her third and fourth points of error, appellant claims there was no evidence and insufficient evidence that the termination of the parent-child relationship between appellant and her child would be in the best interest of the child. Appellant's fifth point of error was withdrawn at oral argument and will not be considered.

In our review of appellant's "no evidence" point, it is fundamental that the jury's fact findings must be upheld by us if there is more than a scintilla of evidence in support thereof. *Stedman v. Georgetown S. & L. Ass'n.*, 595 S.W.2d 486, 488 (Tex. 1979). There is some evidence, more than a scintilla, if the evidence furnishes some reasonable basis for differing conclusions by reasonable minds as to the existence of the vital fact. *Kindred v. Con/Chem, Inc.*, 650 S.W.2d 61, 63 (Tex. 1983). Moreover, in testing these findings, we must review the evidence in its most favorable light, considering only the evidence and inferences which support the findings, and rejecting the evidence and inferences contrary to the findings. *Stedman, supra;* Calvert, *"No Evidence" and "Insufficient Evidence" Points of Error*, 38 TEXAS L. REV. 361 (1960).

On the other hand, when we confront a challenge that the evidence is insufficient, we must consider and weigh all the evidence in the case, including that which is contrary to the verdict. *Burnett v. Motyka*, 610 S.W.2d 735, 736 (Tex. 1980). We must determine whether the verdict was so against the great weight and preponderance of the evidence as to be manifestly unjust. *In re King's Estate*, 244 S.W.2d 660, 661 (Tex. 1951). In other words, this court must decide if the evidence which supports the jury's answers to the special issues is so weak, or the evidence to the contrary is so overwhelming as to

warrant a setting aside of the verdict and remanding for a new trial. *Garza v. Alviar*, 395 S.W.2d 821, 823 (Tex. 1965); Calvert, *supra*.

In parent-child termination proceedings, there are several basic principles that apply. There is a strong presumption that the child's best interest is usually served by keeping it with its natural parents. *Wiley v. Spratlan*, 543 S.W.2d 349 (Tex. 1976). Once evidence is produced to support a finding of the nonexistence of that presumed fact, however, the cause will proceed as if no presumption exists. *In Interest of Guillory*, 618 S.W.2d 948 (Tex.Civ.App. — Houston [1st Dist.] 1981, no writ). In order to support an involuntary termination, the essential facts must be proven by "clear and convincing evidence." This standard is defined as "'that measure or degree of proof which will produce in the mind of the trier of fact a firm belief or conviction as to the truth of the allegations sought to be established.'" *In Interest of G. M.*, 596 S.W.2d 846, 847 (Tex. 1980).

R. B., appellant's child and the subject of this suit, was born three months prematurely on January 8, 1982. At birth she weighed 2 pounds, 5½ ounces, and was placed in the neonatal intensive care unit where she remained for 66 days. R. B. was discharged to appellant on March 15, 1982 weighing 5 pounds, 1 ounce.

R. B. was readmitted to the hospital on June 21, 1982 weighing 6 pounds, 8 ounces. Diagnosis on admission was failure to thrive which is a condition where a child deviates from the expected weight by a considerable amount. The suspected cause was maternal deprivation or unsuccessful mothering and failure to get calories or food into the child. Based on her growth rate while in the hospital the first time, R. B. should have weighed 8 pounds, 1 ounce or 8 pounds, 2 ounces. Eleven days later R. B. weighed 7 pounds, 4 ounces, and she was discharged to a foster home.

Donald Nelms, M.D., testified that failure to thrive results in a number of problems for the child. Nelms stated that malnutrition makes a child susceptible to infection. In addition, the child's organs such as the brain and kidneys do not grow

properly. Nelms also testified, "[I]f the child doesn't grow properly, it will not have the correct amount of mental function. It will be slow in school, have learning disorders and not do as well intellectually." Nelms indicated that one factor contributing to R. B.'s condition was maternal deprivation which, in addition to unsuccessful mothering, includes not feeding long enough, not staying with the child and feeding the correct quantities, and lack of interaction between the mother and child. Nelms stated that he believed if R. B.'s condition had been allowed to continue, actual harm to the child would have resulted.

Jennifer Bell, a social worker with the Child Development Program, testified that R. B. was referred to the Child Development Program as a result of being in the intensive care nursery during the first 66 days of her life. The program monitors the development of high risk infants and children. The social workers make home visits, remind mothers of clinic appointments, provide transportation, and check on how the babies are doing as well as monitor parent education.

Bell testified that she had enrolled appellant in the Child Development Program in early April, 1982, and made several appointments for R. B. to go to the clinic. Appellant missed the first appointment scheduled for May 5. When Bell arrived at appellant's house to take her to the clinic, appellant was asleep. After being awakened by Bell, appellant asked that the appointment be reset. A second appointment was scheduled for June 15. Bell stated that on her June 7, 1982 home visit she saw R. B. lying on a twin bed which had no guardrails being fed by a propped bottle. Appellant told Bell on that occasion that she was feeding R. B. cow's milk and strained vegetables. Bell gave appellant parent education on bonding, holding, and feeding the baby and specifically told her not to prop the bottle.

Bell visited again on June 14 and found appellant watching television with her sisters in the living room and the baby was again found on the twin bed, with no guardrails, with a bottle propped. There were also roaches crawling on the bed. Bell

also testified that she helped appellant set up a crib for the baby which appellant had but had never set up.

On June 15 Bell arrived at appellant's apartment to take appellant and R. B. to the clinic. Appellant was still in bed when Bell arrived and again asked to reschedule the appointment. Bell, who was concerned about R. B.'s condition insisted that the appointment be kept. After R. B. was examined at the clinic, an appointment was made for R. B. at the John Peter Smith Hospital pediatrics clinic for that same day which appellant did not keep. A few days later, June 21, R. B. was admitted to the hospital. Appellant, however, did not visit her baby for several days after the baby's admission to the hospital.

Marilyn McCurdy, a case worker for the Department of Human Resources, testified that she became acquainted with R. B.'s case after the Department of Human Resources received a referral that the child was very underweight and had been missing clinic appointments. McCurdy went to appellant's home and observed that R. B. was very small for her age and very badly congested. McCurdy stated that she suggested to appellant that the baby should be taken to the hospital and offered to take them there. In the emergency room at John Peter Smith Hospital, McCurdy observed appellant attempt to feed R. B. by propping a badly leaking bottle on the bed for the baby. McCurdy stated that she asked appellant to hold the baby while she fed her. McCurdy also stated that appellant told her she fed Robin three times each day. A nurse who had also observed how badly the bottle was leaking went to get a bottle of formula for R. B. McCurdy testified that the nurse fed R. B. McCurdy also testified that she stayed with appellant and R. B. for four hours in the emergency room. Before leaving the hospital, McCurdy was assured by appellant that she would remain at the hospital until R. B. was admitted or released. McCurdy stated that she learned the next day that appellant had not stayed as promised.

Gloria Corder, a child protective service worker with the Department of Human Resources, testified that she met

appellant on June 22, 1982, the day after R. B. was readmitted to the hospital. Corder also testified that she tried to explain to appellant why R. B. was in the hospital and why the Department of Human Resources had received the referral. Corder stated that it was her impression that appellant did not understand why R. B. was in the hospital. Corder also stated that appellant told her that she had not taken the baby for immunizations. On cross-examination Corder testified that she talked to appellant about R. B.'s neglect and made recommendations or suggestions to appellant about improving her care of R. B.

Appellant also testified in this case. She stated that she was 18, had never been married and was the natural mother of R. B. During the time R. B. was in her care, appellant resided with her own two children, two adult sisters and their five children. Appellant suffers from Graves' Disease which has caused her to feel nervous, dizzy and sick. At the time of trial, appellant's condition was controlled by medication to the point that it no longer affected her.

Appellant knew that R. B. was premature and needed special medical attention after birth. Appellant also knew that R. B. continued to need special care after her release from the hospital. Appellant testified that the only time R. B. was checked by a doctor was when R. B. had a cold and appellant took her to the emergency room. Appellant also testified that on that occasion she sat in the emergency room a long time, got tired and just went home. The next day a nurse at the emergency room telephoned appellant and told her to bring R. B. back to the hospital.

Appellant stated that although she knew that appointments were made for R. B. to see a doctor, and she knew R. B. needed to see a doctor, appellant stated that on one occasion she did not have transportation and that on other occasions she "just didn't make it."

Although appellant also testified that she was never given any instructions on how to care for a premature child, there was controverting evidence on this point. Appellant further testified that she never propped a bottle on a pillow for R. B.,

but she, her sisters, or her mother would feed R. B. There was controverting evidence on this point as well. It is the function of the jury to pass on the weight of the evidence and the credibility of the witnesses. Where there is conflicting evidence, the jury verdict on such matters is generally regarded as conclusive. *Tejas Gas Corporation v. Magers*, 619 S.W.2d 285, 286 (Tex.Civ.App. — Texarkana 1981, writ ref'd n.r.e.).

In reviewing the record, we find that the jury had sufficient evidence before it to support its findings that appellant had knowingly placed or allowed the child to remain in conditions or surroundings which endangered the physical or emotional well-being of the child.

We now turn to the question of whether or not termination of the parental rights is in the best interest of the child. There are a number of factors which may be considered in ascertaining the best interest of the child. These factors include:

1) The emotional and physical needs of the child now and in the future;

2) The emotional and physical danger to the child now and in the future;

3) The parental abilities of the individuals seeking custody;

4) The plans for the child by the agency seeking custody;

5) The stability of the home or proposed placement;

6) The acts or omissions of the parent which may indicate that the existing parent-child relationship is not a proper one; and

7) Any excuse for the acts or omissions of the parent. *Holley v. Adams*, 544 S.W.2d 367 (Tex. 1976). Of course, these are not the only factors which may be considered.

There is evidence that R. B. is still in need of special care due to the fact of her premature birth. Judith Swartz, M.D., physician with the Child Development Program, stated that the Program follows high risk infants from zero to three years for development delays. A premature child is a high risk child and therefore a premature child would need special care from birth to age three.

The fact that appellant had not had any trouble with her older daughter who was not premature and apparently did not

need special care would not be determinative of appellant's ability to care for R. B. This is especially true since appellant testified that she would continue to care for R. B. in the same manner as she had during the time R. B. became so malnourished. In addition, appellant's lack of parental abilities as well as her lack of desire to improve these abilities have been well-documented by the evidence. Numerous opportunities were made available to appellant for her to learn how to care for her children, yet she made no effort to take advantage of them. Not only did appellant fail to take advantage of opportunities to improve her own nurturing skills she failed to take advantage of special programs to help high risk infants such as R. B. when appellant knew R. B. needed special care.

The evidence also shows that R. B. is an adoptable child, one for whom "the optium choice" of a family could be made. There is also evidence of many occasions of appellant's indifference toward the child. Although there is evidence that appellant suffers from Graves' Disease, this is not sufficient to excuse her conduct towards her child. Appellant knew of her condition before R. B.'s birth yet did not seek treatment until a social worker arranged a number of appointments for appellant to get medical treatments. Appellant's response to these attempts was also lackadaisical.

Following the principles to be followed in evaluating no evidence and insufficient evidence points as set forth above, and examining the record as a whole, we hold there was sufficient evidence to support the jury's findings that termination of the parent-child relationship between appellant and her child would be in the best interest of the child.

Judgment affirmed.

/s/ Clyde R. Ashworth
CLYDE R. ASHWORTH
JUSTICE

PANEL A
HUGHES, ASHWORTH AND HILL, JJ.
DO NOT PUBLISH
TEX. R. CIV. P. 452

Appendix D
Decree of Termination Entered by the Juvenile Court of Tarrant County, Texas — August 16, 1983

CAUSE NO. 37856-J
IN THE INTEREST OF ROBIN BOLDEN, CHILD
IN THE JUVENILE COURT OF
TARRANT COUNTY, TEXAS

DECREE OF TERMINATION

On the 20th day of June, 1983, Petitioner the TARRANT COUNTY CHILD WELFARE UNIT of the TEXAS DEPARTMENT OF HUMAN RESOURCES, appeared by its representative and by its attorney of record, NORRIS BRANHAM, and announced ready for trial.

Respondent Mother, CHARLOTTE BOLDEN, appeared in person and by her attorney of record, RICHARD GRIFFIN.

Respondent Alleged Biological Father, ROBERT BURNS, although duly and properly cited, did not appear having filed with this Court an *Affidavit of Waiver of Interest In Child.*

BARBARA NUNNELEY, appeared as Attorney Ad Litem for the Child.

The Court having examined the pleadings and heard the evidence and argument of counsel, finds that it has jurisdiction of this cause.

A jury having been demanded, a jury of twelve (12) qualified persons was selected.

All matters in controversy were submitted to the jury on Special Issues.

All questions of law were submitted to the Honorable Court.

All persons entitled to citation were properly cited.

The making of a record of testimony was demanded, and said record was completed by the Certified Court Reporter of the 323rd District Court.

The Court finds that the following child is the subject of this suit:

Name: ROBIN BOLDEN
Sex: Female
Date of Birth: January 8, 1982
Present Residence: Foster Care, Tarrant County, Texas

The jury, after hearing all the evidence and argument of counsel and after full deliberation of the facts, in response to the evidence presented and after full deliberation of the facts, in response to the evidence presented and the charge of the Court were delivered the following Special Issues, and to which they made the following answers to the Special Issues submitted.

SPECIAL ISSUE NO. 1

Do you find by clear and convincing evidence that CHARLOTTE BOLDEN knowingly placed or allowed the child, ROBIN BOLDEN, to remain in conditions or surroundings which endangered the physical or emotional well-being of the Child?

Answer: "Yes" or "No"

Answer: Yes

SPECIAL ISSUE NO. 2

Do you find by clear and convincing evidence that termination of the parent-child relationship between the parent, CHARLOTTE BOLDEN, and the child, ROBIN BOLDEN, would be in the best interest of the Child?

Answer: "Yes" or "No"

Answer: Yes

SPECIAL ISSUE NO. 3

Do you find from clear and convincing evidence that the appointment of the Department of Human Resources as Managing Conservator would be in the best interest of the child, ROBIN BOLDEN?

Answer: "Yes" or "No"

Answer: Yes

The unanimous verdict of the jury was transmitted to the Court and was accepted by the Court.

The jury has found that CHARLOTTE BOLDEN did:

1) Knowingly place or knowingly allow the child, ROBIN BOLDEN, to remain in conditions or surroundings which endangered the physical or emotional well-being of the child.

The jury further found that the termination of parental rights between CHARLOTTE BOLDEN, the mother, and the child, ROBIN BOLDEN, is in the best interest of the child.

The jury further found that the appointment of the Department of Human Resources as Managing Conservator would be in the best interest of the Child, ROBIN BOLDEN.

The Court finds that the Respondent Alleged Biological Father, ROBERT BURNS, has filed with this Court an *Affidavit of Waiver of Interest In Child.*

The Court also finds that termination of the parent-child relationship between ROBERT BURNS, and the child is in the best interest of the child.

IT IS THEREFORE DECREED that the parent-child relationship between CHARLOTTE BOLDEN, the mother, and the child, ROBIN BOLDEN, be and is hereby terminated.

IT IS THEREFORE DECREED that the parent-child relationship between ROBERT BURNS, the Alleged Biological Father, and the child, ROBIN BOLDEN, be and is hereby terminated.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that the Tarrant County Child Welfare Unit of the Texas Department of Human Resources be, and it is hereby appointed Managing Conservator of the child, Robin Bolden, and that the Managing Conservator be and is hereby authorized to place in (sic) the child in adoption.

All relief requested and not granted herein is expressly denied.

Signed this 16th day of August, 1983.

/s/ Scott Moore
JUDGE PRESIDING

APPROVED AND AGREED TO:

/s/ Barbara Nunneley
BARBARA NUNNELEY, Attorney Ad Litem
for the Child

/s/ Richard L. Griffin
RICHARD GRIFFIN, Attorney for
Respondent Mother

/s/ Norris Branham
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Tarrant County Child Welfare Prosecutor
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